IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-900

VELSICOL CHEMICAL CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

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Respondent evidently concedes that when a case becomes moot subsequent to the decision of the court of appeals but prior to final consideration by this Court, it has been the long-settled practice to vacate the judgment below and remand with directions to dismiss. (Brief in Opp. 7 n.5.) Respondent suggests, however, that this Court should abandon this established rule and adopt a completely unprecedented pro-

cedure which Respondent has invented to fit the dimensions of the instant case and which it unveils for the first time in its brief. We submit that Respondent's position is utterly without support in logic, policy, and practice.[1]

Under Respondent's new-fangled system, the Court will initially be required to consider the petition as if a live controversy still existed and to evaluate its "certworthyness." In Respondent's words: "If the Court would have denied the petition had there continued to be a live controversy, it should deny it even though there has been a suggestion of mootness. If, on the other hand, the Court might have granted the petition but for the problem of mootness, it should vacate the judgment of the court of appeals where the mootness is clear and undisputed . . . ." (Brief in Opp. 6.)

Respondent's argument is objectionable in every respect. First, the suggestion is directly contrary to *United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950), which plainly states that the "established practice of the Court in dealing with a civil case in the federal system which has become moot *while on its way here* or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." (Emphasis added.) Respondent is

[1] Petitioner regrets the necessity of filing this Reply immediately prior to the Court's scheduled consideration of the petition. Respondent filed its Brief in Opposition in untimely fashion, however, on March 15, 1978, even though it was due on March 8, 1978 and even though Respondent had already been granted a thirty day extension. Petitioner unexpectedly received the brief a few days ago. When Respondent failed to file its brief as required on March 8, the case was then promptly scheduled for the next Conference.

unable to cite a single case, in the almost two-hundred year history of this Court, in which its suggested procedure has ever been followed or even advocated by any Justice. There has never been any preliminary requirement that four Justices regard the petition as "certworthy."

The settled rule of this Court has been described in the clearest and most unmistakeable terms in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States,* 624-625 (Wolfson and Kurland ed. 1951):

> "But the fact that a case has abated or become moot is of itself and without more, a ground *requiring* the issue of certiorari by the Supreme Court where the lower federal court in any case, or the highest court of a state in a case involving a federal question, has failed to place its decision and judgment upon that ground, or where the case has abated or become moot since the decision of the highest state or lower federal court and pending application for a determination of a petition for certiorari in the Supreme Court. In the enforcement of its settled practices respecting the treatment of moot and abated cases, the Supreme Court will, in such cases, grant the writ of certiorari, vacate or reverse the judgment or decree and remand the cause in order that the proceedings may be dismissed by the trial court. This is done irrespective of the merit or importance of the case or of the correctness of the decision below on the points there decided and irrespective of how the facts establishing that the cause has become moot or has abated are called to the Court's attention." (footnotes omitted.)

As stated above, and confirmed by the cases cited therein and in our petition, the merit or importance of the

case is irrelevant. Respondent concedes that the authorities we have cited support this conclusion. (Brief in Opp. 7 n.5.) No good reason has been given as to why this Court should henceforth consider the merits of the underlying issues in moot cases.

Second, by urging that the Court consider the "merits" of a petition in a moot case as a precondition to vacating the judgment below, Respondent would have the Court engage in the impermissible practice of rendering advisory opinions. This overlooks the elementary principle that this Court's jurisdiction, under Article III of the Constitution, is limited to actual cases and controversies. To consider the merits of a petition in a moot case as a prerequisite to vacating the lower court judgment would involve the Court in the resolution of hypothetical questions and would be wholly improper. If the instant case is moot (and Respondent does not seriously contest the point), then there is no occasion, or authority, for the Court to consider the merits.

To refuse to vacate the judgment below would unfairly expose Petitioner to the possible legal consequences of a judgment that is unreviewable solely because of mootness. This Court has always vacated the lower court's judgment in such circumstances. We submit that there is no occasion for a departure from that uniform practice. In sum, this Court should reject Respondent's illogical improvisation. The proper course is stated in *Munsingwear*.

With regard to the other issues raised in our petition, Respondent's brief only confirms the error below. The lower court's decision is in disregard of applicable precedents and would warrant review were the case not moot.

Respectfully submitted,

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